No. 359

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ALBERT E. GRAY,
Plaintiff in Error,

vs.

S. Prentiss Smith, Frank Miller and William P. Harrington,
Defendants in Error.

Answer to Reply of Defendants in Error.

SIDNEY V. SMITH,
VINCENT NEALE,
Attorneys for Plaintiff in Error.

Writ of Error to the Circuit Court of the United States, for the Ninth Judicial Circuit, in and for the Northern District of California.

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Answer to Reply of Defendants in Error.

We asked leave to file the following answer to the brief of defendants in error for the reason that their brief does not reply to anything in the plaintiff's brief, but is confined to a point which was never raised in the trial Court, and which, therefore, we could not have anticipated, and which we considered misleading. This misleading point is the attempt to read together the contract between Gray and Mills, and the written agreement signed by Donohoe, and thereby to make it appear that Mills was affected by or could base a defense to Gray's claim upon the terms of the Donohoe document.

The Donohoe agreement was not an "offer;" it was a written *acceptance* of Cavanagh's offer, a written undertaking to give effect to Gray's negotiations with Mills that Cavanagh had brought to his notice. It required no "accept-

ance " to give it force or effect. It was simply an authority for Gray to close his negotiations with Mills, and a means whereby he could carry them into effect; that the document was thus understood both by Donohoe and Mills is abundantly apparent.

This, however, is of no real importance, for, whatever the documents may be called, it is clear that they cannot be read together as forming the mutual agreement between the parties, the breach of which forms the present cause of action.

Any attempt to read two documents together as forming one agreement would fail unless it could at least be shown not only that the date of the instrument and subject matter thereof were the same, but that, for obvious reasons, there was also identity of parties.

The law is too well settled to require argument; we will, however, quote Craig vs. Wells, 11 N. Y., 315; Cornell vs. Todd, 2 Denio, 130; Warvelle on Vendors, pp. 134, 135.

Defendants' counsel appear to be very anxious to mix up and confound these two several and distinct documents; thus on pages 4 and 17 of defendant's brief attention is called to the fact that Mills rejected Donohoe's "offer;" on pages 5 and 7 it is stated that Donohoe would not have conveyed upon the terms of the Gray-Mills contract, and on page 20 it is said that the Court below found that Mills refused to enter into a new contract, meaning a contract with Donohoe on the terms of the latter's "offer."

And in the conclusion, page 27, counsel repeats: "It would be singular if one * * could recover damages against his vendee for breach of such contract simply because the vendee in considering an offer made to him by the real owner refuses to enter into such new contract.

All this is merely a false scent thrown across the trail.

It is because we fear that this attempt to confound the two documents may confuse the Court that we have asked leave to file this additional brief.

A mere suggestion of the distinction between the two should suffice to render it apparent. The offer of Mills, which was accepted by Gray, is the contract out of which the rights and obligations of the parties arose, and for the

breach of which by Mills this action is brought. That breach consisted in a withdrawal from it by Mills, upon the advice of his attorneys (Trans., page 42, Finding 12); the rights of the plaintiff were then fixed and could not be affected by the subsequent tender made nearly a week later by Donohoe of his own volition (Trans., foot of page 37) for a different purpose (Trans., page 38), or its rejection by Mills.

Donohoe's written undertaking to sell or to convey the property to Mills was only the mode adopted by Gray to fill his obligation to Mills; it was a link in Gray's chain of title; with its terms Mills had nothing to do. Mills could not be called upon to pay Donohoe $165,000 in cash or one-half of the current year's taxes. And if Mills had accepted the title and had stood ready to comply with his agreement with Gray, Gray could not have complained if he had declined simply to make the payment to Donohoe required by the terms of Donohoe's offer. But a full compliance with his contract with Gray, as expressed in their written agreement, and as implied by the circumstances, was incumbent upon Mills, and if he had fulfilled his own obligations by paying the purchase price agreed on between him and Gray, and by allowing Gray to get in Donohoe's title in his name, as he was bound to do, this litigation could not have arisen. Instead of this he broke off from Gray altogether, and dispensed with Gray's obligation to furnish him the title. Viewed in this way, Donohoe's written agreement or undertaking to give effect to the Gray-Mills negotiations only figures in the case,

1st. As showing good faith on Gray's part in contracting to sell;

2nd. As showing Gray's ability to perform, though such a showing was not strictly necessary;

3rd. As a means in Gray's hands, though in Mills' name, to fulfill his contract of sale.

But it cast on Mills no additional active obligation; nothing beyond the passive duty of allowing Gray to get in the title through its instrumentality.

As to the assertion on page 13 of defendant's brief, that a

vendor cannot recover damages at law for an alleged breach of contract by the vendee, when upon the same facts a Court of Equity would not decree specific performance, it need only be remarked that the assertion is not supported by authority, and will not bear scrutiny.

The remedy by specific performance proceeds upon the theory that the contract is still in existence, and is sought by the party who adheres to it and desires to carry it into effect. He must, therefore, be himself ready and able to fulfill it in every detail. The suit for damages for a breach, however, is maintainable where one party has renounced the contract, and the other party takes him at his word, and likewise treating the contract as at an end, asks for the damages which he has suffered by reason of the breaking off of the contractual relation. The latter, therefore, need only show that he performed his full duty up to the moment of the breach. All else is excused him.

The oral argument of counsel for the defendants in support of the position that under certain sections of the Civil Code no damages can be awarded for the breach of a contract of exchange, is fully answered by a reference to Civil Code 1806, which applies all the provisions of the title on sale to exchanges, and enacts that each party has the rights and obligations of a seller as to the things which he gives, and of a buyer as to the things which he takes.

Of the cases cited by defendants' counsel, Doogood vs. Rose, 67 English Common Law Reports, 132, involved an alleged breach of contract under class "A," specified on page 4 of plaintiff's opening brief. It was an action for breach of contract of apprenticeship. The last section quoted in defendants' brief is mere dictum, as well as inapplicable to the case at bar. Wilmot vs. Wilkinson, 6 B. & C., 506, discussed therein, is in plaintiff's favor.

Goetz vs. Walters, 34 Minnesota, 239, Burke vs. Davis, 85 Cal., 110, were cases of options given for a purchase, not cases of a sale and purchase.

The other cases relied on by defendants have been discussed in our opening brief.

Lastly, on pages 25 and 26 of defendants' brief, appears a

quotation from a trial brief prepared by the plaintiff's attorneys, which extract defendants succeeded in getting incorporated in the bill of exceptions. We think that any extract of counsel's argument can have no place in a bill of exceptions for the reasons urged on the oral argument. Certainly this extract cannot be construed as an admission, and equally certainly if it can be considered at all, it must be read in connection with the whole of the plaintiff's brief and line of argument, so that the weight to be given to it can be ascertained from the full context.

June 24, 1897.

Respectfully submitted,

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VINCENT NEALE,

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